IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming the decision of the Appellate Court of Illinois is reported at 68 Ill. 2d 269, 369 N.E.2d 881 (1977). It is reproduced in the Appendix to the Petition for Certiorari at p. 1a.

The opinion of the Appellate Court of Illinois, First District, entered on February 26, 1976, affirming petitioner's conviction, is reported at 36 Ill. App. 3d 304, 343 N.E.2d 517 (1976). It is reproduced in the Appendix to the Petition for Certiorari at p. 6a.

JURISDICTION

The decision of the Supreme Court of Illinois was entered on October 5, 1977. The Petition for Rehearing was denied on November 23, 1977. The Petition for Writ of Certiorari was filed on February 21, 1978. Certiorari was granted on May 30, 1978. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1) Whether the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel when a defendant is charged with an offense punishable under state law by imprisonment, regardless of whether the defendant is in fact imprisoned?

2) Whether the trial of Petitioner Scott without the assistance of counsel was so unfair as to deny due process of law?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 31, 1972, petitioner Aubrey Scott appeared without counsel before the Circuit Court of Cook County, Illinois, on a charge of theft in violation of Ill. Rev. Stat. Ch. 38, § 16-1(A)(1) (1972). This is a misdemeanor which carries a possible sentence of a fine not to exceed $500 or imprisonment not to exceed one year, or both.

When Scott approached the bench the Judge advised him that he was charged with the offense of theft. (A. 6) The Record does not indicate that Scott was given a copy of the complaint, which alleged in substance that Scott had on or about January 19, 1971, committed the offense of theft in that he knowingly obtained or exerted unauthorized control over a sample case and address book worth $13.68, the property of F. W. Woolworth, with the intent to deprive F. W. Woolworth permanently of the use and benefit of said property in violation of Ill. Rev. Stat. Ch. 38, § 16-1(A)(1). (A. 1-2) Because the complaint was filed on January 21, 1972, and the initial and only court appearance was 10 days later, it is probable that the 1971 date alleged both in the complaint and by the complainant at trial as the year of the offense was in error, although the Record is not conclusive on this point.

The Judge first asked Scott whether he was "going to be ready for trial," but when Scott asked if he meant "am I ready?" the Judge said "yes." Scott answered that he was ready for trial. The court clerk then arraigned Scott, telling him he was charged with theft and asking whether Scott was ready for trial and how he pleaded to the charge. Scott replied that he was

ready for trial and pleaded not guilty. The clerk then asked whether Scott wanted "to be tried by this court or before a jury," to which Scott replied "Well, it doesn't matter. Right here will be okay with me." (A. 7) Scott was never advised that he had a right to representation by counsel and, if unable to afford counsel, a right to appointed counsel.

The one witness for the prosecution, a store security guard, then testified to his version of the incident. On January 19, 1971, he observed Scott ask a sales girl to unlock some attache cases, which she did. He then watched Scott for between fifteen and twenty minutes while Scott walked back and forth by the sales girls with a ten dollar bill in his hand. He observed Scott pick up an address book and put it in his pocket. After watching Scott for five more minutes, the guard walked out on State Street where a few minutes later Scott walked out with "the attache case." When the guard ordered Scott back in the store, Scott told him the case belonged to him. The guard further testified that prior to walking out of the store Scott had put a number of articles inside of the case, including ones Scott had apparently brought to court. The guard identified what was apparently an attache case as Woolworth's property and said he believed it had a tag indicating the value as twelve ninety-nine. After the State offered unidentified matter into evidence, the guard was excused. Scott did not ask the guard any questions, nor was he told he could do so.

The State then rested and immediately thereafter the Judge asked Scott what he wished to say. (A. 8) Scott testified that he had put things in the case to see if they would fit and that, as he was partially blind, he could not find the sales girl, but he was constantly looking for her. When someone grabbed Scott and accused him of

being a shoplifter Scott denied it and showed him the money he said he had to pay for whatever he was buying. The police then came, handcuffed him and took him to jail.

The State's Attorney then rested on the State's case. The Judge asked the State's Attorney to ask more questions because "There's a lot of questions I want to know." (A. 9) The State's Attorney, however, told the Judge to ask the questions, observing that he felt the State had made its case. The Judge then said there were still questions as to how much money Scott had, what he did with the money, whether he offered the money to anybody and whether he ever saw a sales clerk. Scott responded that he had almost $300 in his pocket and that he did not see the sales girl because she did not have a counter to work behind. The Judge then directly questioned Scott as to where he was when he was arrested and what he was going to buy with the ten dollar bill. Scott replied that he was inside the store when he was stopped and that he was going to pay the girl with the ten dollar bill or with more if she said it, as he had it to pay. Immediately after this statement the Judge said "I don't believe you, sir. Finding of guilt." (A. 10)

The court sergeant then stated that Scott had been convicted of petty larceny in 1957, for which he had been sentenced to thirty days in the House of Correction. Scott responded that that was thirteen years ago and that he was not guilty of trying to make a theft. The State's Attorney then recommended probation, but the Judge pronounced a sentence of "Fifty and no costs." (A. 10)

Through counsel, Scott filed a timely notice of appeal and a motion for a free transcript of the trial proceedings, supported by an affidavit of indigency, which motion was granted. The Appellate Court of Illinois found that the reach of the Sixth Amendment right to counsel is limited to defendants who are in fact imprisoned, and therefore Scott had no constitutional right to an appointed trial counsel. (Appendix to cert. petition, 13a-14a) The Appellate Court also rejected Scott's statutory argument that he had a right to appointed counsel under Ill. Rev. Stat. Ch. 38, § 113-3(b), which requires the court to appoint the Public Defender for indigents desiring counsel "in all cases, except where the penalty is a fine only. . . ." The Supreme Court of Illinois affirmed on both grounds. (Appendix to cert. petition, 1a-6a).

SUMMARY OF ARGUMENT

A misdemeanor-theft prosecution is a "criminal prosecution" within the terms of the Sixth Amendment, whether or not the defendant is imprisoned. The rationale of *Gideon v. Wainwright*, 372 U.S. 335 (1963), in making the Sixth Amendment right to counsel obligatory upon the States as an essential element of due process does not depend upon the seriousness of the particular criminal prosecution. The Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), rejected a limitation on any Sixth Amendment right, except the right to jury trial, on the basis of the seriousness of the criminal case. However, even with respect to the historically unique right to jury trial, the relevant criterion for determining whether an offense is serious enough to warrant the protection of the right is the penalty authorized by law rather than the penalty imposed in fact.

Rejection of an imprisonment-in-fact requirement for the right to counsel in this case would not necessarily require extension of the right to all legal violations punishable by imprisonment, such as minor traffic violations. However, whatever the Court eventually may determine to be the outer reaches of the definition of a "criminal prosecution" for the purposes of the Sixth Amendment, petitioner's prosecution clearly fits that definition since misdemeanor-theft has all of the many indicia of a traditional criminal offense.

As a matter of legal practice as well as legal principle it would be illogical to make the right to counsel the one Sixth Amendment right that is restricted by an imprisonment-in-fact requirement since meaningful exercise of the other Sixth Amendment rights, especially the

right to jury trial, depends upon exercise of the right to counsel.

The trial court violated petitioner's Sixth Amendment right to counsel by not advising him of his right to representation either by his own hired counsel or by appointed counsel if indigent. Scott's failure to request such representation did not waive his right to counsel.

Assuming *arguendo* that the Sixth Amendment right to counsel does not reach petitioner's misdemeanor-theft prosecution, the denial of counsel nevertheless violated due process of law. Whatever due process test the Court finds appropriate to this proceeding, the process that is due requires those safeguards that are essential for an accurate adjudication of fact. In light of the Court's findings in *Argersinger*, it is no longer subject to dispute that counsel is as essential for a fair trial in a misdemeanor prosecution as it is in a felony prosecution.

The governmental costs of providing fair fact-finding procedures have been a factor in the Court's administrative due process cases only where the costs have been of an extraordinary nature. The overriding governmental interest in this case, however, is not one of cost, but one of assuring that criminal trials result in fair determinations of guilt or innocence. Moreover, if judges must decide before trial which misdemeanor defendants do or do not require counsel and, therefore, which may or may not be imprisoned, governmental interests will suffer in several ways. Sentencing will become uninformed guess-work and a usurpation of legislative intent. Where convictions are uncounseled, non-imprisonment penalties, such as a fine, probation, or suspended sentence will become of dubious effectiveness. The State's interest in using prior convictions for collateral purposes such as impeachment, enhancement of

sentence, or revocation of probation or parole, will be minimized where those convictions were uncounseled. Deciding before trial that certain indigent misdemeanor defendants will not be afforded the right to appointed counsel and will therefore be immunized from imprisonment will also create serious equal protection problems.

Reliable evidence as to the added cost of providing a right to counsel in misdemeanor cases punishable by imprisonment does not exist. However, several respected commissions and studies that have examined the question have determined that the cost would not be excessive and that extension of the right in such cases would be worthwhile. Twenty-two States have already done so. Costs may also be saved by the greater efficiency from having trained counsel on both sides.

The violation of petitioner's right to equal protection of the law from the denial of appointed counsel at trial is even greater than the equal protection violation found in the denial of appointed counsel on appeal in *Douglas v. California*, 372 U.S. 353 (1963), since the harm from the denial of trial counsel is more severe than the harm from the denial of appellate counsel.

Should the Court approve a case-by-case determination of each misdemeanor defendant's right to counsel, that determination must satisfy the requirements of due process both because it jeopardizes an interest of defendant deserving due process protection and because it creates a substantial risk of error and prejudice without such protection. The protected interest is defendant's greatly increased likelihood of acquittal as a result of representation by counsel. The pre-trial determination of each defendant's right to counsel runs substantial risk of error because it requires the evaluation of several com-

plex, interrelated factors, including the difficulties of presenting a competent defense, the capacity of the defendant to represent himself and the likelihood of imprisonment upon conviction. The risk of prejudice from the pre-trial determination of the right to counsel arises both from the trial judge's exposure to unfavorable presentencing information about the defendant and the judge's need to rely upon *ex parte* communications with the prosecution in order to attain such information. The procedural safeguards required for an accurate, nonprejudicial determination of each defendant's right to counsel are: 1) a determination made pursuant to an on-the-record adversary hearing at which the defendant may object to improper evidence about himself, may argue why he needs counsel for his defense, and, where incapable of so arguing, may be heard through counsel regarding the reasons his defense requires counsel; 2) written reasons by the judge to support a refusal to appoint counsel, and, 3) a trial before a judge other than the one who heard any unfavorable inadmissible information about the defendant before trial.

To reverse petitioner's conviction because his trial was unfair, rather than because he was denied the right to counsel, would establish a principle of judicial review that both would be contrary to the premises of *Gideon* and *Argersinger* and would be as uncertain, ineffective, and as inequitable to indigents as the special circumstances rule of *Betts v. Brady*, 316 U.S. 455 (1942). Nevertheless, the unfairness in petitioner's trial was so pervasive that reversal is required under many of the criteria of fundamental unfairness established in the post-*Betts*, pre-*Gideon* line of Supreme Court cases.

ARGUMENT

I.

THE SIXTH AMENDMENT RIGHT TO COUNSEL APPLIES IN ALL STATE CRIMINAL PROSECUTIONS REGARDLESS OF WHETHER IMPRISONMENT RESULTS.

The Sixth Amendment specifies in uniformly mandatory terms the basic protections the Framers thought indispensable to a fair trial. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973); *Farretta v. California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting). It applies the right to counsel "in all criminal prosecutions." It does not apply the right, as the State of Illinois would have it, 'in all criminal prosecutions except for misdemeanor prosecutions not resulting in imprisonment.' Because the Sixth Amendment right to counsel is an essential element of fundamental fairness, it has been incorporated against the States. *Gideon v. Wainwright*, 372 U.S. 335 (1963). A decision not to apply the right to counsel to petitioner's criminal prosecution because no imprisonment resulted would contradict not only the language of the Amendment and the rationale of its incorporation by *Gideon*, but it would also depart from the Court's unwavering application of the right to counsel at the trial phase of criminal prosecutions regardless of the seriousness of the offense.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court rejected a proposed exemption from the right to counsel for petty offense prosecutions that have an authorized penalty of less than six months imprisonment. The Court found no historical support for a limitation of the Sixth Amendment right to counsel on the basis of the seriousness of the criminal case. 407 U.S. at

30. Although the right to jury trial had been limited to serious offenses because it "has a different genealogy and is brigaded with a system of trial to a judge alone," 407 U.S. at 29, the Court found in *Argersinger* that it has never limited the application to the States of any of the other Sixth Amendment rights on the basis of the seriousness of the offense charged. 407 U.S. at 27-30. *Cf. In re Oliver*, 333 U.S. 257 (1948) (right to a public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process of witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Groppi v. Wisconsin*, 400 U.S. 505 (1971) (right to an impartial jury); *Henderson v. Morgan*, 426 U.S. 637 (1976) (right to be informed of the nature and cause of the accusation).

Although the Court has refused to create an exception to the right to counsel for petty offenses based on the length of imprisonment authorized by law, Illinois purports to recognize a form of "ultra-petty offense" exception based on the lack of imprisonment imposed in fact. A decision upholding this principle would not only be devoid of support in the language and history of the Sixth Amendment, but it would also be inconsistent with the primary measure the Court has previously applied in determining the seriousness of criminal offenses.

The few cases that have considered the seriousness of a criminal prosecution in determining the applicability of constitutional safeguards demonstrate that the punishment authorized by law, not the punishment imposed in fact, is the critical determinant of whether an offense is sufficiently serious to warrant constitutional safeguards. Thus, in *Frank v. United States*, 395 U.S. 147, 149 (1969), the Court summarized:

> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense.

In *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968), the Court explicitly rejected an argument, based on *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), that the penalty actually imposed, rather than the sentence authorized, is the relevant criterion in distinguishing between serious and petty offenses for purposes of the right to a jury trial.[1] The Court in *Duncan* noted that *Cheff*, a criminal contempt case, "does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question." 391 U.S. at 162 n.35. *See also, Baldwin v. New York*, 399 U.S. 66, 68-70 (1970).

The Court has also applied the authorized imprisonment standard with respect to rights other than the right to a jury. In *United States v. Moreland*, 258 U.S. 433 (1922), the Court, in analyzing the reach of the Fifth Amendment requirement of presentment or indictment by a grand jury, stated: "[T]he test is not the imprisonment which *is* imposed, but that which *may be* imposed under the statute." *Id.* at 437 (quoting *Fitzpatrick v. United States*, 178 U.S. 304, 307 (1900)). *See*

[1] Even in contempt cases, Mr. Justice Douglas would not consider the sentence actually imposed as a measure of the seriousness of an offense: "The relevance of the sentence, as we have seen, is that it sheds light on the seriousness with which the community and the legislature regard the offense. Reference to the sentence actually imposed in a particular case cannot serve this purpose." *Cheff v. Schnackenberg*, 384 U.S. 373, 390-391 (Douglas, J., dissenting).

also Mackin v. United States, 117 U.S. 348, 351 (1886). In determining the procedural safeguards required in a juvenile delinquency proceeding, the Court in *In re Gault*, 387 U.S. 1, 42 (1967), required the right to counsel because of the "potential commitment" in such proceeding, not because Gault was in fact committed.

Although the Court did not discuss the type of criminal penalties necessary to invoke the Sixth Amendment right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), it is significant that the Court did not limit the right to cases in which imprisonment is in fact imposed.[2] Rather, the Court repeatedly emphasized the necessity of counsel in order to protect one who is "charged with crime." 372 U.S. at 344. The Court has also never interpreted *Gideon* as restricting the right to counsel in terms of the penalty actually imposed, but instead, has construed it as applying to felony cases in general. *Argersinger v. Hamlin*, 407 U.S. 25, 31-32 (1972).[3] *See also* concurring opinions of Harlan, J. and Clark, J. in *Gideon v. Wainwright*, 372 U.S. at 351 and 348-349.

In sum, the Court has never held the seriousness of a state criminal prosecution to be determinative of the

[2] Similarly, the Court has never limited the Sixth Amendment right to counsel in federal criminal trials because of the lack of actual imprisonment, but rather, has described the right as applying "in every case, whatever the circumstances," *Foster v. Illinois*, 332 U.S. 134, 136-137 (1947), or "in all criminal proceedings," *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

[3] The Court in *Argersinger* did not extend the right to counsel to cases in which imprisonment is not imposed. However, the Court's refusal in *Argersinger* to "consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . ." 407 U.S. at 37, indicates that the Court was not endorsing an exception to the right to counsel for cases not resulting in imprisonment. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

reach of any Sixth Amendment right, except the right to a jury trial. Moreover, whenever the seriousness of a prosecution for any crime, except contempt, has been a factor in applying constitutional safeguards, the relevant test of seriousness has been the length of imprisonment authorized by law, not the imprisonment imposed in fact.

The Court's rejection of an imprisonment-in-fact requirement for the right to counsel in this case would not necessarily require extension of the right to every defendant charged with an offense punishable by imprisonment. Certain types of offenses, referred to variously as quasi-criminal, public welfare or regulatory offenses, which would include minor traffic violations, could conceivably not be deemed "criminal prosecutions" within the meaning of the Sixth Amendment, even though they are punishable by imprisonment.[4] *Cf. People v. Letterio*, 16 N.Y.2d 307, 266 N.Y.2d 307, 266 N.Y.S.2d 368 (1965); *but see Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alas. 1970); *See also Middendorf v. Henry*, 425 U.S. 25, 38 (1976).

Regardless, however, of what the Court may eventually find to be the outer reaches of the Sixth Amendment's application to criminal prosecutions, the misdemeanor-theft prosecution of petitioner Scott is a "criminal prosecution" within any reasonable construction of the Amendment's language. All of the

[4] Petitioner, however, does not advocate such an approach, because it would substitute essentially arbitrary labels for the seriousness of potential punishments actually faced by defendants, a factor which the Court in *In re Gault*, 387 U.S. 1, 27-30 (1967), and *Specht v. Patterson*, 386 U.S. 605, 608-9 (1967), found determinative of the need for procedural safeguards. This approach would also disregard the criterion deemed most important in the Sixth Amendment jury trial cases—the seriousness with which a legislature views an offense when it authorizes imprisonment for its violation. *Supra* pp. 13-15.

traditional indicia of criminal prosecutions are satisfied by the theft charge brought against Scott. Theft, or larceny, was a felony at common law, *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943). It was also considered infamous at common law because it exhibited "particular turpitude and baseness of character" and because of the severe nature of its punishment. *Ex parte McClusky*, 40 F. 71, 74 (Cir. Ct. D. Ark. 1889). It requires proof of *mens rea*. Ill. Rev. Stat. Ch. 38, §§ 16-1, 4-3, 4-4 and 4-5 (1971). Perhaps, most important, theft calls forth the moral condemnation of the community, a point emphatically made by the Court in *Morissette v. United States*, 342 U.S. 246, 260 (1952):

> Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution. . . .

See also Middendorf v. Henry, 425 U.S. 25, 39 (1976) (larceny carries "a stamp of 'bad character' with conviction."). The maximum sentence of one year imprisonment set by the Illinois misdemeanor-theft statute also shows the seriousness with which the community regards the crime. *Cf. Frank v. United States*, 395 U.S. 147, 148 (1969). Furthermore, significant adverse collateral consequences attach to a misdemeanor-theft conviction in Illinois, as in most States. *Infra* 44 note 25. Finally, misdemeanor-theft prosecutions have all of the "invariable attributes" of the criminal trial process, the adversary nature of which "is one of the touchstones of the Sixth Amendment right to counsel. . . ." *Middendorf v. Henry*, 425 U.S. 25, 40 (1976) (footnote omitted).[5]

[5] The Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973), identified those attributes as the following: "In a criminal

(Footnote continued on following page)

Considered individually or together, these factors leave no doubt that Scott's prosecution for theft was a "criminal prosecution" within the meaning of the Sixth Amendment.

Aside from the explicit language of the Sixth Amendment, it would be anomalous to make the right to counsel the one Sixth Amendment right dependent for its application upon the imprisonment-in-fact standard, since it is the right to counsel that makes the other Sixth Amendment rights effective. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."); Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.R. 1, 8 (1956) ("Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.")

The illogic of making the right to counsel the subordinate Sixth Amendment right is most clearly illustrated by the resulting functional negation of the right to a jury trial. Although all defendants charged with misdemeanors punishable by over six months imprisonment have the right to a jury trial, *Baldwin v. New York*, 399 U.S. 66 (1970), according to the Illinois Supreme Court only those ultimately imprisoned are entitled to the assistance of counsel in presenting their case to the jury. Although the court clerk asked Scott if he wanted to be tried by a jury (A. 7), this was an

[b] *continued*
trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely pressed; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics."

empty gesture under the circumstances, for if Scott had not waived this right, he would have been faced with a trial that, as a layman, he was clearly incapable of handling. As Mr. Justice Douglas noted, concurring in *Carnley v. Cochran*, 369 U.S. 506, 524 (1962), a jury trial for one without counsel becomes "a labyrinth he can never understand nor negotiate . . . a trap for the layman because he is utterly without ability to make it serve the ends of justice." *See also Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972) (Powell J., concurring in result) ("If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.")

The effectiveness of the other Sixth Amendment rights is equally dependent upon the assistance of counsel, as the trial record below demonstrates. Scott was not advised of and did not exercise his right to cross-examine the one witness against him, although the right to confrontation is fundamental to fairness and has not been limited solely to imprisoned defendants. *Pointer v. Texas*, 380 U.S. 400 (1965); *Brookhart v. Janis*, 384 U.S. 1 (1966). Similarly, he was not advised of nor did he exercise his right to compulsory process for obtaining witnesses in his favor, although the Court had applied that right to the States in *Washington v. Texas*, 388 U.S. 14 (1967). Nor was Scott given a copy of the complaint, advised of what he was alleged to have taken, nor told of the elements of, or the penalty for, the offense with which he was charged—all clearly contrary to the intent of the Sixth Amendment, as set forth in *Smith v. O'Grady*, 312 U.S. 329, 333-334 (1941), and *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). Finally, although the trial judge's admitted doubts about the sufficiency of the State's proof indicate the importance of closing argument in order both to capitalize on those doubts and to "correct a premature misjudgment and

avoid an otherwise erroneous verdict," *Herring v. New York*, 422 U.S. 853, 863 (1975), the judge by his peremptory ruling gave Scott no notice of, nor opportunity to exercise, his right to make a closing summation, contrary to the Court's decision in *Herring*. *See infra* Part V, pp. 62-64, for additional grounds of unfairness in Scott's trial. Because it is impossible to know what the effect of these fundamental rights would have been had counsel been present to exercise them, harm to the defendant is irrebuttably presumed from the denial of the right to counsel itself. *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1181, 1182 (1978). Thus, if a defendant who is fined, but not imprisoned, for a misdemeanor punishable by imprisonment is to be given any of the Sixth Amendment rights that are fundamental to a fair trial, the practical demands of the adversary criminal trial process require that one of those rights be the right to counsel. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

Once the Sixth Amendment right to counsel is held to apply to Scott's misdemeanor prosecution, it necessarily follows that the trial judge violated that right by failing to advise Scott of his right to appointed counsel if indigent, since a fundamental constitutional right cannot be denied a defendant because of his financial inability to exercise that right. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). However, the trial court violated Scott's right to counsel not only because it failed to advise him of his right to appointed counsel if indigent, but also because it neglected to inform him of his right to be represented by his own counsel at his own expense. In *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), the Court held that a defendant under a sentence of life imprisonment as an habitual criminal had an unqualified right to be heard through his own counsel. *See also Powell v.*

Alabama, 287 U.S. 45, 68-69 (1932). To limit that right in misdemeanor prosecutions because the defendant is not imprisoned would serve no valid state interest, would subject the defendant to the same fundamental unfairness found unacceptable in *Gideon* and *Argersinger*, and would countenance a procedure in misdemeanor cases not even permitted by the court of the Star Chamber, BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 8-9 (1955). *Cf. In re Gault*, 387 U.S. 1, 29 (1967).

Scott, of course, requested neither the appointment of counsel nor the opportunity to be represented by his own hired counsel. However, Scott's silence in this regard cannot be construed as a valid waiver of his right to counsel since the State has the burden of demonstrating that the failure to request counsel was an "intelligent relinquishment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and this it cannot do on the basis of a silent record. *Carnley v. Cochran*, 369 U.S. 506, 513-517 (1961); *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

In sum, a construction of the right to counsel "in all criminal prosecutions" that would deny this right to defendants who are not imprisoned for misdemeanors punishable by imprisonment would be aberrant in several respects. It would be inconsistent with the Court's application of all other Sixth Amendment rights to state prosecutions, other than contempt, without regard for the sentence actually imposed. It would disregard *Argersinger's* rejection of a petty offense exception to the reach of the right to counsel. It would ignore numerous Court decisions measuring the seriousness of an offense by the severity of the penalty authorized by the legislature. It would make the Sixth Amendment right that is most critical to procedural fairness, the most

restrictive in availability. It would for no reason qualify what the Court has held to be the unqualified right to be heard through one's own counsel. Most important, it would ignore the essential insight of *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

II.

DUE PROCESS OF LAW REQUIRES THE RIGHT TO COUNSEL AT A MISDEMEANOR-THEFT TRIAL REGARDLESS OF WHETHER THE DEFENDANT IS IN FACT IMPRISONED.

A.

The Decisive Factor In Determining Whether A Defendant Has A Due Process Right To Counsel In A Misdemeanor Trial Is Whether Counsel Is Necessary For A Fair And Accurate Judicial Fact-Finding Process.

The Sixth Amendment defines the basic protections that the Framers thought indispensable to a fair trial, without which "justice will not 'still be done.'" *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938) (footnote omitted); *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973). The Court, therefore, does not engage in a balancing of individual and governmental interests in deciding whether the full measure of Sixth Amendment protections apply. If a prosecution for a misdemeanor punishable by imprisonment is a "criminal prosecution" within the intendment of the Sixth Amendment, the analysis of this case need thus go no further, since the right to the assistance of counsel is embodied in the Amendment. However, assuming *arguendo* that such a prosecution is deemed something other than criminal, the right to counsel is nevertheless still required under the

Fourteenth Amendment because a serious misdemeanor prosecution, such as theft, jeopardizes interests that both deserve due process protection and require the assistance of counsel to achieve such protection.

The first question in any due process analysis—whether the nature of the liberty or property interest at stake warrants due process protection, *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972)—is easily resolved in the context of a misdemeanor-theft conviction in which no imprisonment is imposed. The stigma, the fine, the possibility of probation and the collateral disabilities caused by any misdemeanor conviction are sufficiently severe state-inflicted penalties to warrant whatever procedural safeguards are essential to assure that these deprivations result only from a fundamentally fair fact-finding process. See *infra* pp. 42-46.

The second part of the due process analysis is not as simply resolved because it is unclear exactly what test should be used to determine the process due in a proceeding that is conducted as a criminal trial, but is nevertheless deemed not criminal for the purposes of the Sixth Amendment. In *In re Gault*, 387 U.S. 1 (1967), the Court analyzed the safeguards required by due process in a non-criminal proceeding that is closely analogous to petitioner's misdemeanor trial. The Court based its finding of a due process right to counsel in a juvenile delinquency hearing on two factors: the hearing's possible consequence of commitment, 387 U.S. at 41, and the juvenile's need for "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it." 387 U.S. at 36. Both factors are present with even greater force in petitioner's misdemeanor prosecution. First, he was charged with an offense that has a

statutory maximum sentence of one year's imprisonment in a penal institution. Second, he is a layman who had to defend against the prosecutor's case alone without even the pretense of a specially trained judge mandated to protect his best interests. *Gault's* importance to the recognition of a due process right to counsel in misdemeanor cases is made even clearer by *Argersinger's* explicit reliance on *Gault* in concluding that counsel is needed for a fair trial in prosecutions for crimes less serious than felonies. 407 U.S. at 33-34.

In *Gault* the Court did not weigh in its due process analysis the governmental cost of providing counsel. However, in its decisions analyzing the process due in administrative proceedings the Court has weighed the factor of governmental cost against the factors of the individual interests at stake and the relation of the requested procedural safeguard to the truth-seeking function. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Given both the uniquely grievous individual harm resulting from a misdemeanor-theft conviction and the formal procedures and rules of law that must be followed by both sides in a misdemeanor trial, the due process analysis used in *Gault*, rather than that used in *Mathews*, is appropriate to the type of judicial proceeding required in a misdemeanor prosecution.[6] However,

[6] *Mathews* itself indicates that its test was designed for the needs of assuring fairness in administrative, rather than judicial, fact-finding: "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." 424 U.S. at 348. More recently, the Court in *Dixon v. Love*, 431 U.S. 105, 115 (1977), indicated that the standards appropriate for determining the requisites of procedural due process in the administrative setting are different from the standards appropriate for settings where the judicial model is applicable. Moreover, the critical question in most of the Court's administrative due process decisions has

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the question of whether the *Mathews* balancing test would unduly defer to the governmental cost factor in determining the process due in a misdemeanor prosecution not deemed criminal under the Sixth Amendment need not be resolved in this case. For, even when the governmental cost factor is weighed in the due process balance, the other two factors on the scale decisively demonstrate that the right to counsel is an indispensable element of due process in misdemeanor trials.

B.

Because It Is Undisputed That The Assistance Of Counsel Is Essential To A Fair Misdemeanor Trial, Assertions That Appointed Counsel Is Too Costly Cannot Outweigh The Petitioner's Due Process Right To Counsel.

Assuming *arguendo* the appropriateness of the *Mathews v. Eldridge* due process balancing test, its outcome in this case is determined by the weight to be accorded the first factor in that test—the relation of the requested safeguard to the truth-seeking function. Where the procedural safeguard in question is deemed essential to a fair administrative fact-finding process, the Court has required that safeguard to be provided, unless either of two conditions are shown: (a) there are emergency or extraordinary reasons why the government cannot afford fair procedures,[7] *Board of Regents v.*

[6] *continued*
been whether the procedures necessary for a fair adjudication of fact must be provided in advance of the deprivation or can be postponed until afterwards. *Cf. Memphis Light, Gas and Water Div. v. Craft*, ... U.S. ....., 98 S.Ct. 1554, 1565 (1978). However, there is no afterwards for procedural fairness at the judicial trial stage. Lack of needed counsel is always harmful and the degree of harm cannot be gauged on appeal. *Cf. Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1182 (1978).

[7] The Court has expressed this governmental burden in a variety of ways. The "rather ordinary costs" of time, effort,

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Roth, 408 U.S. 564, 570 n.7 (1972); or (b) the individual deprivation is of a *de minimis* nature. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Only where the procedural safeguards requested have not been essential to a fair fact-finding process has the Court found those safeguards to be outweighed by the extra costs they would place on government. *Cf. Memphis Light, Gas and Water Div. v. Craft*, ... U.S. ....., 98 S.Ct. 1554, 1565 (1978).

The State has never disputed in this case the proposition that a misdemeanor trial cannot be a fair fact-finding process unless the defendant as well as the State has the assistance of counsel. Such an assertion would be untenable in light of the Court's many opinions concerning the right to counsel since *Gideon v. Wainwright*, 372 U.S. 335 (1963). Denial of the right to counsel, the Court has stated, goes to "the very integrity of the fact-finding process," *Linkletter v. Walker*, 381 U.S. 618, 639 (1965), and "substantially impairs its truth-finding function . . . ." *Williams v. United States*, 401 U.S. 646, 653 (1971). Recent decisions denying the right to counsel in simple probation revocation hearings, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and summary courts-martial proceedings, *Middendorf v. Henry*, 425 U.S. 25 (1976), have only served to clarify the Court's understanding that in the very different context of a traditional criminal trial the invariable attributes of the adversary judicial process make a fair trial impossible

[7] *continued*
expense and efficiency cannot outweigh the right to procedural due process. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 n.22 (1972). If it is "within the limits of practicability," due process requires the State to provide a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 318 (1950)). *See also, Bell v. Burson*, 402 U.S. 535, 540 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

without the assistance of counsel. *See also, In re Gault*, 387 U.S. 1, 36 (1967); *Farretta v. California*, 422 U.S. 806, 832-833 (majority opinion) and 838 (Burger, C.J., dissenting) (1975); *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1181 (1978); *Schneckloth v. Bustamonte*, 412 U.S. 218, 241-242 (1973). Moreover, as the Court found in *Argersinger*, 407 U.S. at 33-37, the necessity of counsel for a fair trial is as great in petty offense and misdemeanor trials as in felony trials. *Infra* p. 51. *See also, Sibron v. New York*, 392 U.S. 40, 52 (1968). This fact is fully illustrated by the trial in the instant case. *See infra* Part V. pp. 62-64.

As noted *supra* pp. 23-24, *In re Gault*, 387 U.S. 1 (1967), provides the clearest illustration of the subordination of the governmental cost factor in a due process analysis where the right to counsel is deemed essential to a fair fact-finding process. Two more recent decisions in which the Court found no due process right to counsel in quasi-judicial proceedings reveal no departure from *Gault's* emphasis on the necessity of counsel for fairness in judicial proceedings. In *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973), the Court did recognize that the cost of adding counsel for *both* the State and the probationer in probation revocation hearings would not be insubstantial. However, the Court's refusal to require the right to counsel in all revocation proceedings was based on its finding that given the nature and purpose of the hearing, the probationer can be given fair treatment, and possibly more favorable treatment, without counsel and the procedural formalization counsel entails.[8] Moreover,

[8] "In a revocation hearing, on the other hand [contrasted to the attributes of a criminal trial], the State is represented not by a prosecutor but by a parole officer with the orientation described above ["concern for the client dominates his professional attitude"]; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation and parole." 411 U.S. at 789.

despite the added cost, the Court required the State to provide counsel where, based upon the facts and circumstances of the individual case, "the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate." 411 U.S. at 788.

Unlike *Gagnon*, the Court in *Middendorf v. Henry*, 425 U.S. 25, 44 (1976), did consider the "extraordinarily weighty" governmental interests at stake to be the paramount factor in denying the due process right to counsel in summary courts-martial proceedings. Noting the "overriding demands of discipline and duty" of armed forces personnel, quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953), the Court found compelling the Congressional determination that the unique interests of the military in having brief, informal hearings without counsel outweighed the individual interests in having counsel.[9] *Id.* at 45. Nevertheless, the Court took care to point out that in a summary court-martial the non-adversary, adjudicatory hearing, unlike a criminal trial, could be administered fairly without counsel.[10] *Id.* at 40-42.

[9] *Middendorf* cannot be viewed as a true *Mathews v. Eldridge* type of due process, interest balancing case since the Court found it necessary to "give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. 1, § 8, that counsel should not be provided in summary courts-martial." 425 U.S. at 43.

[10] The summary court-martial proceeding described by the Court is more inquisitorial than adversary, the presiding officer being "enjoined to attend to the interests of the accused." 425 U.S. at 41. Furthermore, where the serviceman believes counsel important in order to present his case he can elect to proceed to trial by special or general court-martial where he has a right to counsel. *Id.* at 47. Whether the demands of military necessity would still have prevailed had the Court found that fair adjudication required the assistance of counsel is an interesting but irrelevant question in the context of the

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Thus, the Court has never tolerated the deprivation of protected liberty and property interests through fundamentally unfair trial procedures because of the cost of providing fair procedures. The fact that providing such counsel may be an expense to the government is therefore not a legally cognizable justification for the government's refusal to provide the defendant with a right to counsel. Even if analogy is made to the Court's administrative due process decisions, governmental cost becomes a factor in the context of an adversary proceedings only if it is of an extraordinary nature. The only governmental interest of extraordinary importance at stake in this case, however, is that of assuring that the right to counsel is provided in misdemeanor trials.

C.

The Government's Interest In Assuring The Right To Counsel In Misdemeanor Trials Outweighs The Possible Added Expense Of Providing Such Counsel.

1. Providing The Right To Counsel In Misdemeanor Trials Is In The Interest Of Society And, Therefore, Of Government.

The government has a paramount interest in assuring that criminal trials result in fair determinations of guilt or innocence. The Court declared in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." The Court's

[10] *continued*
instant case where there is neither a governmental interest to weigh in the balance that is remotely similar to the needs of the armed forces nor a separation-of-powers clause problem in applying the dictates of due process.

finding as to the necessity of the reasonable doubt standard in order to command the respect and confidence of the community in the criminal law, *In re Winship*, 397 U.S. 358, 364 (1970), is equally true with respect to the necessity of defense counsel. Both are essential to assure that "every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Id.* The Court recognized that to leave people in doubt whether innocent men are being condemned will dilute the moral force of the criminal law. *Id.*

Uncertainty as to the validity of the criminal trial process will also tend to cause anti-social responses on the part of those convicted in a trial that did not have the appearance of fairness. *Cf. Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). The Court's observation in *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972), with respect to society's interest in treating the parolee with basic fairness is even more important with respect to the defendant convicted in a criminal trial; for both of them "fair treatment . . . will enhance the chances of rehabilitation by avoiding reactions to arbitrariness." (footnote omitted).

Procedural due process, the Court has recently noted, has an importance to organized society of an absolute nature that transcends the personal substantive claims of the individual parties. *Carey v. Piphus*, ..., U.S. ....., 98 S.Ct. 1042, 1054 (1978). Denial of the right to counsel to defendants not actually imprisoned after conviction for misdemeanors punishable by imprisonment will, perhaps, save the State money and will certainly make it easier for the State to win convictions, but those interests are in no respect commensurate with society's

overriding, absolute interest in assuring that its criminal prosecutions are procedurally fair.[11] *Cf. Berger v. U.S.*, 295 U.S. 78, 88 (1935).

2. Important Governmental Interests Will Suffer If The Right To Counsel Is Not Provided In All Misdemeanor Prosecutions Punishable By Imprisonment.

In addition to society's paramount interest in assuring a fair system of criminal justice, other substantial State interests will suffer if the right to counsel is not granted for all defendants charged with crimes punishable by imprisonment, regardless of whether they are in fact imprisoned. First, in order to deny the right to counsel to one charged with a crime punishable by imprisonment, the judge must decide in advance of the trial and sentencing hearing that he will not impose a prison sentence. It is, of course, proper for a judge to decide not to imprison a convicted defendant. However, Illinois, like most States, provides that the judge make this decision *after* the facts of the crime have been determined at trial and *after* a sentencing hearing has been held in order to elucidate the most appropriate sentencing alternative. *Ill. Rev. Stat.* Ch. 38, § 1005-4-1 (1977) and its predecessor, *Ill. Rev. Stat.* Ch. 38, § 8-7(9) (1971).

Dispensing with the trial and sentencing hearing in deciding the appropriate sentence defies not only legislative intent, but also accepted principles of rational judicial sentencing. In describing the role of the sentencing judge, the Court has stated: "Highly relevant—if

[11] Judge Friendly has pointed out that under the circumstances of a trial an inflexible rule requiring the right to counsel is appropriate since there is "everything to be gained by the presence of counsel and no interest deserving consideration to be lost. . . ." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L.R. 929, 950 (1965) (quoted in *Schneckloth v. Bustamonte*, 412 U.S. 218, 242-243 n.30 (1973)).

not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 247 (1949). (footnote omitted). To deprive the sentencing judge of the kind of information presented at the sentencing hearing, the Court observed:

> . . . would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

337 U.S. at 250. *A fortiori*, without even the information that has been adduced in court as to the nature of the defendant's criminal conduct, the judge's pre-trial predictive sentencing decision can only be uninformed guess-work that disserves the State's interest in rational, individualized sentencing. On the grounds that pre-trial predictive sentencing is both arbitrary and a usurpation of the legislative judgment that imprisonment is an appropriate alternative sentence for the type of crime charged, the Supreme Courts of Washington[12] and

[12] *McInturf v. Horton*, 85 Wash. 2d 704, 706, 538 P.2d 499, 500 (1975) "We reject the idea that a court can determine in advance of trial what the punishment will be. Such a procedure would violate every concept of due process. . . . The power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative. . . . It would be wholly wrong for a court or a judge to determine in advance to abrogate a part of a statute or ordinance—either in a specific case or in a whole class of cases."

Wisconsin[13] have accorded the right to counsel for all defendants charged with crimes punishable by imprisonment. *See also, Argersinger v. Hamlin*, 407 U.S. 25, 53 (1972) (Powell, J., concurring in result). According to the one comprehensive study of the implementation of *Argersinger* by the lower courts, most of the judges interviewed believed "any sort of individualized-prediction hearing prior to trial was impractical and unwise." KRANTZ et al., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN, 90 (1976) (hereinafter cited as KRANTZ).

Denying the right to counsel to misdemeanor defendants who are not imprisoned will not only make the sentencing determination uninformed, but will also render the sentences themselves of dubious effectiveness. Because it is unconstitutional under *Argersinger* to imprison a defendant as a result of an uncounseled conviction, presumably an indigent, and possibly any uncounseled defendant who cannot or does not pay his fine will be immune from imprisonment, as will be any uncounseled defendant who violates the terms of his probation, supervision or suspended sentence. For indigent uncounseled defendants fines will be meaningless; for all uncounseled defendants, probation and supervision will be hollow sanctions.[14] Cf. *Argersinger v. Hamlin*, 407 U.S.

[13] *State ex rel. Winnie v. Harris*, 75 Wis.2d 547, 556, 249 N.W.2d 791, 795-6 (1977) "Under this individualized prediction standard, the mere fact that the right to counsel has been gone into strongly indicates that the judge is already considering the possibility of jail for a particular defendant even though he has not heard the evidence. On the other hand, this system would also result in people not being incarcerated who should be because of an erroneous evaluation of sentence limitations prior to hearing the evidence in the case."

[14] An imprisonment-in-fact requirement for application of the right to counsel may even proscribe entirely sentences of probation, supervision, or conditional discharge for un-

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at 55 (1972) (Powell, J., concurring in result); Krantz, *supra* at 33-44.

The State's interest in preserving the reliability of prior convictions for collateral use where they are important for informed decision-making will also be impaired by a rule depriving unimprisoned defendants of the right to counsel. Because uncounseled misdemeanor convictions are unconstitutional if they "end up in the actual deprivation of a person's liberty," *Argersinger*, 407 U.S. at 40, it would also be unconstitutional to use an uncounseled conviction in order to deprive a person of liberty in a subsequent proceeding.[15] Thus, uncounseled prior convictions could not be used to enhance punishment for subsequent offenses,[16] to revoke a suspended

[14] *continued*
counseled misdemeanor defendants. *Cf. LaBar v. Goodman*, 397 F.Supp. 463, 464 (W.D.N.C. 1975). The Court's holdings in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Hensley v. Municipal Court*, 411 U.S. 345 (1973), that parole restrictions and release on personal recognizance bond are sufficient deprivations of liberty to satisfy the custody requirement of the federal habeas corpus statute, 28 U.S.C. §§ 2241(c) and 2254(a), indicate that probation, supervision, and conditional discharge may likewise be held sufficiently serious deprivations of liberty to satisfy the imprisonment standard of *Argersinger*.

[15] *Marston v. Oliver*, 485 F.2d 705 (4th Cir. 1973); *Alexander v. State*, 527 S.W.2d 927 (Ark. 1975); *Morgan v. State*, 235 Ga. 632, 221 S.E.2d 47 (1975). Note, *Argersinger v. Hamlin And the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 Ohio St. L.J. 168, 179-184 (1974).

[16] *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975); *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968); *Morgan v. State*, 235 Ga. 632, 221 S.E.2d 47 (1975); *City of Monroe v. Fincher*, 305 So.2d 108 (La. 1974); *State v. Kirby*, 33 Ohio Misc. 48, 289 N.E.2d 406 (1972); *Maghe v. State*, 507 P.2d 950 (Okl. Crim. 1973) *but see People v. Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459 (1977) cert. petition pending, No. 77-6219.

sentence,[17] to revoke parole or probation,[18] or to impeach the defendant.[19] Moreover, since the use of prior uncounseled convictions would be allowed by a prudent trial judge only in the least serious prosecutions in which there is no likelihood of imprisonment, the policy against affording the right to counsel in all misdemeanor prosecutions would have the illogical result of denying to the State the use of a defendant's record of past uncounseled convictions in the more serious prosecutions, where such record is most important to the State's law enforcement goals.

An additional problem for the State in supporting an imprisonment-in-fact limitation on the right to counsel in misdemeanor cases is that it would deny its non-indigent citizens the equal protection of the laws when they are charged with a crime for which they may be imprisoned, but for which indigents who are not appointed counsel may not be imprisoned. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 55 (1972) (Powell, J., concurring in result). Although the trial court's pre-trial decision to eliminate the possibility of imprisonment confers a relative benefit on the basis of a defendant's indigency, the equal protection clause has been held to require that maximum statutory penalties "for any substantive offense be the same for all defendants irrespective of their economic status." *Williams v. Illinois*, 399 U.S. 235, 244 (1970). Indeed, the Court in *Williams* stated

[17] *Alexander v. State*, 527 S.W.2d 927 (Ark. 1975).

[18] *State v. Harris*, 312 So. 2d, 643 (La. 1973); *Dugan v. Cardwell*, [1978] Pov. L. Rep. (C.C.H.) ¶ 26,330 (Ariz. Sup. Ct. June 21, 1978).

[19] *Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976); *Commonwealth v. Barrett*, 322 N.E.2d 89 (Mass. App. 1975); *Cf. Loper v. Beto*, 405 U.S. 473 (1972).

that it would constitute inverse discrimination to allow indigents to avoid both a fine and imprisonment for non-payment, whereas other defendants must suffer one or the other. 399 U.S. at 244. An identical type of inverse discrimination would occur under a pre-trial predictive sentencing process for indigent defendants since before trial all non-indigents would be subject to a fine and imprisonment, while selected indigents, identical to the non-indigents in every respect except their economic status, would be subject only to a fine. The only remedy for this equal protection violation would be to hold pre-trial predictive sentencing evaluations for all defendants, regardless of indigency, and then to apply to all of them the same criteria for eliminating the possibility of imprisonment.[20] However, this would constitute both an extreme judicial incursion into the integrity of the statutory sentencing scheme and a costly use of court time and manpower.

The equal protection problems for the State in this pre-trial sentencing process will be magnified when such wealth-related distinctions are made either on the basis of the different policies on appointment of counsel adopted by the various jurisdictions within a single State or on the basis of the individual judges' predilections as to either the seriousness of different classes of offenses or the need to have counsel for fair trials. When each judge applies his own personal unpublished standard for determining before trial what types of trials require counsel for fairness and what types of offenses deserve the legislatively authorized sanction of imprisonment, arbitrary and discriminatory differences in the determination of the rights and liabilities of identically situated defendants will be inevitable. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 54 (1972) (Powell J. concurring in result); KRANTZ, *supra* at 101-104.

[20] This, however, would not avoid the equal protection violation, discussed *infra* in Part III, pp. 47-50, that would arise from denying indigent misdemeanor defendants the right to appointed counsel at trial even if they are not imprisoned.

Each of the foregoing problems the State encounters when it requires a judge to choose before trial which defendants should or should not have the right to counsel may not by itself be of sufficient constitutional magnitude to invalidate the process for pre-trial selection of the defendants deserving counsel. However, when considered together as a factor in the due process interest belancing test, the collective detrimental effect of such problems clearly outweighs the modest cost-benefit that may accrue to the State from denying appointed counsel to some of the indigent misdemeanor defendants who are not imprisoned.

3. Providing The Right To Counsel In All Misdemeanor-Theft Prosecutions Will Not Result In Impracticable Costs.

The one interest the State, of course, can assert against affording the right to counsel to all defendants charged with misdemeanors punishable by imprisonment is that this may entail an additional expense for the State.[21] Two recent comprehensive studies of the

[21] In evaluating claims that such additional expense would be unbearable, it is instructive to note that despite the forecasts that the rule in *Argersinger* would overtax the resources of the courts, the one comprehensive study that has surveyed the question "uncovered no judges who claimed that *Argersinger* requirements imposed any extraordinary burdens on the courts." KRANTZ, *supra* at 433.

question of how costly it would be to afford counsel in such cases concluded that reliable statistics to support an accurate estimate of this cost do not exist, that "the question of calculating the cost of defense services remains largely an enigma." GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Final Report of the National Study Commission on Defense Services, 259 (1976); KRANTZ, *supra* at 10-18. Nevertheless, the conclusion that has been drawn by these two studies, as well as by several other nationally recognized commissions that have recommended standards for the criminal justice system, is that the right to appointed counsel for indigent defendants should be available in all misdemeanor cases punishable by imprisonment.[22]

In reaching this conclusion the National Conference of Commissioners on Uniform State Laws determined that the cost of providing counsel for indigent defendants charged with offenses punishable by incarceration would not be excessive. Uniform Rules of Criminal Procedure, Rule 321(b) Comment, p. 54 (1974). The Commissioners based this conclusion on two findings: first, that appointed counsel can represent twice as many non-felony as felony defendants and second, that despite the

[22] GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, 15; KRANTZ, *supra* at 104 (1976); National Conference of Commissioners on Uniform State Laws, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 321(b) (Approved Draft 1974); The National Advisory Commission on Criminal Justice Standards and Goals, COURTS, Standard 13.1 (1973). *See also*, President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 368. ("The objective to be met as quickly as possible is to provide counsel to every defendant who faces a significant penalty, if he cannot afford to provide counsel himself.")

considerably greater number of non-felony than felony defendants, only about one and one-half times as many non-felony as felony defendants require appointed counsel because only 10% of the former, as opposed to 60-65% of the latter, meet necessary indigency standards. *Id.*

The Commissioners also noted that legislatures adopting their rule would no doubt reclassify some minor offenses presently punishable by incarceration. *Id. See also* KRANTZ, *supra* at 502, 550. Although the Court recognized in *Argersinger* that classification of crimes is largely a state matter, if the State is indeed concerned that it cannot afford to provide counsel for indigent defendants in all of the minor offense prosecutions that now carry the potential for imprisonment, the State can, as noted in *Argersinger* and as recommended by the American Bar Association Special Committee on Crime Prevention and Control, remove such minor offenses from the court system altogether. 407 U.S. 25, 38 n.9 (1972). Because of the cost-saving potential of such decriminalization, the National Advisory Commission on Criminal Justice Standards and Goals, recommended that appointed counsel be available in *all* criminal cases. *Courts*, Standard 13.1 (1973). The Commission reasoned that if its recommendation to decriminalize most traffic offenses were followed, the non-jailable misdemeanors would constitute a very small category of cases. Therefore, because of the minimal incremental cost involved, the Commission found that it would be worthwhile in terms of fairness and the image of criminal justice in the lower courts to extend the right to counsel to such non-jailable offenses. *Id.* at 253-254.

Even if legislatures do not choose to decriminalize minor traffic violations, the increase in the number of

defendants who would require appointed counsel as a result of a ruling in favor of petitioner's right to counsel would be relatively slight if the ruling were to be limited to offenses as serious as petitioner's misdemeanor-theft conviction. The largest proportion of non-felony prosecutions are not for the more serious *malum in se* or common law crimes, such as theft, but rather, are for the minor regulatory-type offenses, such as traffic violations, public drunkenness or disorderly conduct. National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, 168-169 (1973); KRANTZ, *supra* at 449, 595. Moreover, in the jurisdictions that do not presently extend the right to counsel to all prosecutions of misdemeanors punishable by imprisonment, it is likely that relatively few defendants charged with the more serious misdemeanors are now tried without counsel because the prosecutor and trial court will usually wish to keep open the option of imprisonment in such cases.

Conclusive evidence that it would not be an impractical or undue burden on the State to provide the right to counsel in all misdemeanor prosecutions punishable by imprisonment is that twenty-two States now do exactly that. *See* Appendix to Petitioner's Brief. No reports of resulting impracticality or undue burdensomeness have been forthcoming.[23] The Court has previously found the fact that States have voluntarily adopted a rule of procedure to be persuasive evidence that it would not cause undue hardship on the States if the Court should also find such rule constitutionally required. *Elkins v. U.S.*, 364 U.S. 206, 218-219 (1960); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961). *Cf. Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

[23] A review of state legislation and court rules after *Argersinger* reveals a trend towards adopting a broad right to counsel rule either in all criminal cases or in all cases where imprisonment is authorized. Once adopted, no State appears to have abandoned such a rule.

Finally, in evaluating the net cost of providing a right to counsel in all misdemeanor cases, it is important not to discount the cost savings due to the more efficient and expeditious completion of cases that is possible when both sides are represented by experienced counsel. The Chief Justice has noted that a result of the lack of competent advocates has been "that it often takes far longer to complete a given case than experienced counsel would require . . ." and that it would almost certainly follow if self-representation were to become widespread "that there will be added congestion in the courts and that the quality of justice will suffer." *Farretta v. California*, 422 U.S. 806, 845 (1975) (Burger C.J., dissenting).

In sum, the weight to be accorded a governmental cost argument against finding a due process right to counsel in misdemeanor prosecutions that are punishable by imprisonment depends upon which of two alternative due process analyses the Court finds applicable. First, under the approach taken in *In re Gault*, 387 U.S. 1 (1967), the findings that counsel was essential for a fair trial and that the juvenile proceeding had a potential for confinement were sufficient in themselves to require the right to counsel without any balancing of governmental costs. Because both findings are equally, if not more strongly, applicable to misdemeanor prosecutions punishable by imprisonment, the right to counsel should also be afforded in such cases regardless of a governmental cost factor.

Alternatively, under the due process balancing test of the less analogous administrative procedure cases, *supra* pp. 24-25 only extraordinary governmental costs can be weighed against the need for procedural safe-

guards that are essential for fair fact-finding. Because there is no evidence that requiring counsel in misdemeanor prosecutions punishable by imprisonment would require governmental costs of an extraordinary nature, it is unnecessary to determine whether the individual and societal importance of fairness in misdemeanor trials should outweigh the problems attendant upon such extraordinary governmental costs. Thus, whichever due process test is adopted, the governmental cost of providing the right to counsel in misdemeanor cases affords no basis for denying that right.

D.

The Individual Interest At Stake In A Misdemeanor-Theft Prosecution Not Resulting In Imprisonment Is Substantial Enough To Require The Essential Elements Of A Fair Trial.

The only remaining argument against affording the right to counsel in prosecutions for misdemeanors punishable by imprisonment, but resulting in a fine and/or probation, is that the harm to the defendant is of a *de minimis* nature and, therefore, not deserving of due process protection. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). This argument, however, cannot survive a moment's reflection as to the inevitable effect on an individual's self-respect when he is permanently classified by society as a criminal. The Court recognized the significance of the personal disgrace attendant upon a criminal conviction in a society that values the good name of every individual when it observed that an accused has an "immense interest" in a criminal prosecution, not only because he might lose his liberty, but also "because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363, 364 (1970).

In addition, the imposition of a fine will necessarily be a deprivation of substantial consequence to the indigent misdemeanor defendant, whose right to appointed counsel is by definition at stake in this case. Besides fines and imprisonment, other forms of misdemeanor sentences also inflict deprivations serious enough to warrant due process protection. Thus, a misdemeanor defendant in Illinois may undergo substantial restrictions on his liberty because of a sentence of "probation," Ill. Rev. Stat. Ch. 38, §§ 1005-1-18, 1005-6-2 (1977), "conditional discharge," Ill. Rev. Stat. Ch. 38, §§ 1005-1-4, 1005-6-2 (1977), or "supervision," Ill. Rev. Stat. Ch. 38 §§ 1005-1-21, 1005-6-3.1 (1977).[24] The Court has recognized the significance of such deprivations in finding federal habeas corpus jurisdiction where the habeas petitioner is on parole. "What matters," the Court stated, is that such restrictions "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

Any attempt to portray the effects of a misdemeanor conviction without imprisonment as inconsequential also cannot withstand comparison with both similar and less serious criminal-type sanctions that the Court has deemed sufficiently grievous to justify imposition of substantial procedural safeguards. Most telling is a comparison with the fine-only, municipal ordinance violation that the Court in *Mayer v. City of Chicago*, 404 U.S. 189 (1971), found serious enough to justify requiring the City

[24] Furthermore, if a sentence of "time served" for an uncounseled misdemeanant who has been unable to afford bail does not violate *Argersinger's* prohibition against imprisonment as a result of an uncounseled conviction, such a sentence would substantially aggravate the stigma that otherwise follows from a misdemeanor conviction.

to provide a free appellate transcript estimated to cost $300.00. In answer to the City's argument that "where the accused . . . is not subject to imprisonment, but only a fine . . . his interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process," the Court noted, *inter alia*, that the fine-only conviction may be equally or more severe to an indigent than imprisonment:

> The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent defendant as forced confinement. The collateral consequences of conviction may be even more serious. . . .

404 U.S. at 197. The comparison of the instant case to *Mayer* is revealing because the interests of a defendant in having counsel at trial in order to avoid a theft conviction clearly outweigh the interests of a defendant in having a transcript to facilitate an appeal of an ordinance violation conviction. *See infra* pp. 48-50.

It is also instructive to compare the degree of deprivation from a misdemeanor conviction where the sentence is a fine and/or probation with the one day's confinement that the Court in *Argersinger* found sufficient to warrant the right to counsel. As noted by the Court in *Mayer*, 404 U.S. 189, 197, and by Mr. Justice Powell concurring in the result in *Argersinger*, 407 U.S. at 48, the many collateral consequences of a conviction, such as the stigma, various job disqualifications and license revocations, may be more severe than a brief stay in jail, as also may be a substantial fine for an impecunious individual.[25] The Court has given further recognition to

[25] The seriousness of the collateral consequences of criminal convictions has been noted by numerous legal commentators. Special Project, *The Collateral Consequences of a Criminal*

(Footnote continued on following page)

the seriousness of the collateral consequences of convictions in its many decisions that have refused to dismiss for mootness direct appeals of and collateral attacks upon convictions where the appellant is not in custody.

[25] *continued*

Conviction, 23 Vand. L. Rev. 929 (1970); Cohen, *Civil Disabilities: The Forgotten Punishment*, 35 Fed. Prob. 19 (June, 1971); Rubin, *Man With a Record: A Civil Rights Problem*, 35 Fed. Prob. 3 (Sept. 1971); President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: Corrections (1967). The serious adverse collateral consequences resulting from criminal convictions have also been verified through empirical research. *Cf.* J. Reed and R. Reed, *Status, Images and Consequence: Once A Criminal Always A Criminal*, 57 Sociology and Social Research 460 (1973); Schwartz and Skolnick, *Two Studies of Legal Stigma*, 10 Social Problems 133 (1962); Melichercik, *Employment Problems of Former Offenders*, 2 National Probation and Parole Assoc. Journal 43 (1956). The particular effects on petitioner of his misdemeanor conviction should he choose to remain in Illinois are many. Because a theft conviction indicates dishonesty it may be used for impeachment should petitioner become a witness in court. *People v. Stufflebean*, 24 Ill. App. 3d 1065, 1068-1069, 322 N.E.2d 488, 491-492 (1974). Because jurors must be of "fair character" and "approved integrity," Ill. Rev. Stat. Ch. 78 § 2 (1977), he may be excluded from jury duty as a result of his theft conviction. A subsequent conviction for theft would subject him to the enhanced felony penalty of imprisonment in the penitentiary from one to three years. Ill. Rev. Stat. Ch. 38 §§ 16-1(e)(1), 1005-8-1(7) (1977). *See People v. Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459 (1977) cert. petition pending No. 77-6219. Twelve occupations licensed under Illinois law and twenty-three occupations licensed under City of Chicago ordinance require the license applicant to have "good moral character" or some equivalent background qualification that could be found unsatisfied because of a theft conviction. *See* Chicago Council of Lawyers, *Study of Licensing Restrictions on Ex-Offenders in the City of Chicago and the State of Illinois*, 8, A-17 (1975). Under federal law petitioner's theft conviction would also bar him from working in any capacity in a bank insured by the F.D.I.C., 12 U.S.C. § 1829 (1950), or possibly in any public or private employment requiring a security clearance. 32 CFR § 155.5(h) and (i), and § 156.7(b)(1)(iii).

Sibron v. New York, 392 U.S. 40, 54-57 (1968); *Carafas v. LaValee*, 391 U.S. 234, 237-238 (1968); *Benton v. Maryland*, 395 U.S. 784, 790 (1969); *Street v. New York*, 394 U.S. 576, 579-580, n.3 (1969); *Ginsberg v. New York*, 390 U.S. 629-633, n.2 (1968).

Finally, any argument that convictions for misdemeanors punishable by up to a year's imprisonment are not sufficiently serious deprivations to warrant the due process right to counsel where the defendant is not in fact imprisoned is inconsistent with the holding of *Baldwin v. New York*, 399 U.S. 66 (1970), that the Sixth Amendment right to a jury trial applies to all offenses punishable by more than six months imprisonment, whether or not the defendant is in fact imprisoned. Because denial of the right to counsel, and not denial of the right to jury trial, "substantially impairs . . . [the criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts," *Williams v. United States*, 401 U.S. 646, 653 (1971), it would be anomalous to hold that under due process of law the protection afforded by a jury trial is available in less serious cases than the more critical protection afforded by counsel.

Thus, the adverse effects of a misdemeanor-theft conviction in which a fine and/or probation is imposed are far from *de minimis*. The fine inevitably deprives an indigent of an important property interest and probation deprives any person of substantial liberty interests. The conviction itself forecloses a wide variety of job opportunities across the nation. The permanent stigma of being classified as a criminal diminishes both the individual's standing in the community and his own sense of personal integrity. Therefore, there is no justification for the argument that under the standards of due

process petitioner's deprivation was too minor for the State to be required to afford him the most essential element of a fair trial — the assistance of counsel.

III.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT INDIGENT DEFENDANTS CHARGED WITH MISDEMEANORS PUNISHABLE BY IMPRISONMENT HAVE THE RIGHT TO APPOINTED COUNSEL AT TRIAL REGARDLESS OF WHETHER OR NOT THEY ARE IMPRISONED.

In *Douglas v. California*, 372 U.S. 353 (1963), the Court held that denial of appointed counsel in an indigent defendant's initial appeal of right violates the Equal Protection Clause of the Fourteenth Amendment. There is no principled answer to Mr. Justice Harlan's observation in his dissent that the Court's equal protection rationale applies as well to an indigent defendant's right to counsel at trial. 372 U.S. at 363. *Cf.* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 248. Recent Court decisions have made even more clear that the equal protection right to appointed counsel on appeal must logically extend to the right to appointed counsel at trial.

First, whether at trial or on appeal, the basis for the disparate treatment, the defendant's inability to afford counsel, is the same. It is as unconstitutional now as it was in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), to make "the kind of trial a man gets depend on the amount of money he has." *See Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971). Second, the consequences of an erroneous misdemeanor conviction, even where the penalty is only a fine, are at least as severe as the consequences of the fine-only municipal ordinance violation, which the

Court found sufficiently serious to warrant the guarantee of equal protection in *Mayer v. City of Chicago*, 404 U.S. at 197. ("The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed.")

Third and most important, the nature of the disparate treatment, denial of counsel on the basis of wealth, has more serious consequences for the indigent defendant at the trial level than at the appellate level. As the Court has often noted, not every difference in the abilities of rich and poor to present their defenses is proscribed by equal protection; rather, it is required only "that indigents have an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Draper v. Washington*, 372 U.S. 487 (1963)). If the assistance of counsel were less important for an adequate defense at trial than on appeal, a basis for distinguishing *Douglas* could be argued. However, because the exact contrary is true, the equal protection rationale of *Douglas* applies more forcefully to the instant case than to *Douglas* itself.

More is at stake for the defendant, and his need for counsel greater, when he is fighting to maintain his innocence during trial than when he is attempting to overturn in a higher court a conviction based on an established trial record. In *Ross v. Moffitt*, 417 U.S. at 610, 611, the Court pointed out the significant differences between the trial and appellate stages of a criminal proceeding that make it crucial to have a lawyer at the trial stage, but not necessarily at the appellate stage. With respect to the need for counsel at trial, the Court stated:

> The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances reason and reflection require us to recognize that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)]

Ross, 417 U.S. at 610. At the appellate stage, however, the Court found counsel not as critical:

> The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the state may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

417 U.S. at 610-611.

The distinction made by *Ross* in the importance of counsel at the trial and appellate stages is demonstrated by the example of the instant case. Counsel for Scott at trial could have cross-examined the adverse witness, could have compelled the presence of witnesses, could have moved for a directed verdict in order to challenge the insufficiency of the State's proof, could have either exercised the defendant's Fifth Amendment privilege against self-incrimination or presented a coherent

direct examination, and could have made a closing argument capitalizing on the judge's own professions of doubt about the sufficiency of the State's case. On appeal, these most basic functions of defense counsel are meaningless. The factual record as presented by the examination of the prosecutor, as supplemented by the questioning of the judge and as confused by the testimony of the defendant gives appellate counsel little of substance to argue. Once the adversary system has broken down at trial, it cannot be resurrected on appeal. In sum, if the Equal Protection Clause requires that "indigents have an adequate opportunity to present their claims fairly within the adversary system," *Ross supra*, it makes no sense to require appointment of counsel for indigents on appeal, but not for indigents at trial.[26]

IV.

THE DUE PROCESS SAFEGUARDS NECESSARY TO PREVENT AN INACCURATE AND PREJUDICIAL PRE-TRIAL DEPRIVATION OF A MISDEMEANOR DEFENDANT'S RIGHT TO COUNSEL WOULD REQUIRE EXPENDITURE OF CONSIDERABLE JUDICIAL RESOURCES. THESE RESOURCES COULD BE SAVED BY AFFORDING THE RIGHT IN ALL MISDEMEANOR PROSECUTIONS.

A.

The Fundamental Nature Of A Misdemeanor Defendant's Interest In Having The Assistance Of Counsel At Trial Warrants Due Process Protection Regardless Of Whether Or Not The Defendant Is Imprisoned.

Assuming *arguendo* that there is no absolute constitutional right to counsel in the trial of all mis-

[26] *See also Miranda v. Arizona*, 384 U.S. 436, 472-473 (1966) ("Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and appeal struck down in *Gideon v. Wainwright*, and *Douglas v. California*.")

demeanors punishable by imprisonment, a trial court must make a pretrial determination of the right to counsel in each case. The right must be accorded if the judge predicts either that imprisonment will be likely upon conviction or that the special circumstances of the case will require counsel for a fair trial. *See Argersinger v. Hamlin*, 407 U.S. 25, 63-68 (Powell, J., concurring in result); *Bute v. Illinois*, 333 U.S. 640, 677 (1948); *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

A defendant's interest in assuring that this predictive determination does not unfairly deny him the right to counsel is of a nature deserving due process protection. The actual deprivation at stake in this determination is not only the denial of counsel's assistance, but also the increased likelihood of conviction that results when counsel is denied under circumstances where a fair trial depends upon counsel's assistance.

That lack of counsel substantially increases the likelihood of conviction is evident to anyone familiar with the practicalities of the adversary criminal trial process. The inherent complexities of a criminal trial guarantee that "in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." *Farretta v. California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting.) *See also* cases cited *supra* pp. 26-27. The denial of counsel prejudices the cases of misdemeanor defendants no less than felony defendants. In emphasizing the prejudice to misdemeanor defendants from "assembly-line justice," the Court in *Argersinger* cited the conclusion of one study that "misdemenants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." 407 U.S. at 36.

The fact that a defendant denied counsel may have been convicted even if counsel had been appointed does not mitigate the prejudice from the denial of counsel. The Court has found that a wrongful denial of counsel cannot be deemed harmless since any attempt to ascertain what counsel would have done to avoid conviction would be "unguided speculation". *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1182 (1978). Hence "prejudice is presumed regardless of whether it was independently shown." *Id.* at 1181.

The defendant who is denied the right to counsel does gain a relative benefit in not being directly subject to imprisonment. However, this assurance cannot be presumed to offset the prejudice from being placed in substantially greater jeopardy of conviction. As the Court found in *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971), and as Mr. Justice Powell observed, concurring in the result in *Argersinger*, 407 U.S. at 48, the collateral consequences of a conviction may be far more serious to an individual than a brief stay in jail.

Moreover, where the State's case is highly vulnerable to attack through the exercise of certain basic lawyering skills, such as conducting effective cross-examination, raising timely evidentiary objections, making affirmative legal defenses, motions for directed verdict or closing arguments, the determination of the defendant's right to counsel would virtually determine whether he is acquitted or convicted. In this common situation a state-imposed trade-off between a highly probable acquittal with counsel and immunity from prison without would not be fair to the defendant. Furthermore, since the prosecutor in this type of case has a strong interest in not having the opposition of skilled defense counsel, the unfairness of the trade-off is

compounded by the fact that the prosecutor will have the most influence on the judge's determination of whether defense counsel is necessary. For all of the foregoing reasons, a misdemeanor defendant's interest in the determination of whether or not he has a right to counsel, a determination that will often be the difference between conviction and acquittal, deserves due process protection.

B.

THE DETERMINATION OF THE NEED FOR COUNSEL IN A MISDEMEANOR TRIAL REQUIRES DUE PROCESS SAFEGUARDS IN ORDER TO MINIMIZE THE SUBSTANTIAL RISK OF ERROR AND PREJUDICE AGAINST THE DEFENDANT.

In addition to jeopardizing an important interest of the defendant, the pre-trial determination of the necessity of counsel in each defendant's misdemeanor trial is subject to substantial risk of error and, therefore, requires the safeguards of due process. *Carey v. Piphus*, ... U.S. ....., 98 S.Ct. 1042, 1050 (1978). The trial court in making such an individualized determination of the necessity of counsel would have to address two questions: first, pursuant to the holding of *Argersinger*, whether defendant is likely to be imprisoned if convicted, and second, whether under the special circumstances of the case, the assistance of counsel is required by due process in order to assure a fair trial. An affirmative answer to either question would then require appointment of counsel for an indigent desirous of counsel.

In order to determine whether an individual needs the assistance of counsel for a fair adjudication of guilt or innocence, the Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 791 (1973), and in the line of cases that applied

the "special circumstances" rule of *Betts v. Brady*, 316 U.S. 455 (1942), stressed the importance of two criteria: first, whether the case is complex and the defense difficult to present, and second, whether the defendant is capable of effectively presenting his defense. *Cf.* Israel, *Gideon v. Wainwright: The Art of Overruling*, 1963 Sup. Ct. Rev. 211, 251-252. In addition to the complexity of the case and the competency of the individual defendant, Mr. Justice Powell pointed out, concurring in the result in *Argersinger*, that the trial court should also consider in determining the need for counsel in a misdemeanor case the seriousness of the probable sentence upon conviction and the community's attitude toward either the defendant or the incident in question, 407 U.S. at 64. Mr. Justice Powell also noted that "there might be other reasons why a defendant would have a peculiar need for a lawyer which would compel the appointment of counsel in a case where the court would normally think this unnecessary." *Id.* It is inconceivable that a judge could arrive at an accurate and fair weighing of all of these intricate factors without first observing certain elementary principles of procedural due process, such as affording both sides an opportunity to be heard. *See infra* Part IV-C, pp. 56-59, for discussion of applicable due process safeguards.

Applying due process standards to the determination of the necessity of counsel in misdemeanor cases is necessary not only to assure an accurate assessment of the defendant's need for counsel, but also to protect the defendant from the serious potential for prejudice that inheres in the process of making pre-trial determinations as to the nature of the case, the character of the defendant or the likelihood of his imprisonment. The potential for prejudice under these circumstances is present whether or not the trial court ultimately decides to

appoint counsel and may be even greater when the court does make an appointment. As the Wisconsin Supreme Court has observed: "Under this individualized prediction standard, the mere fact that the right to counsel has been gone into strongly indicates that the judge is already considering the possibility of jail for a particular defendant even though he has not heard the evidence." *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W. 2d 791, 795-6 (1977).

Whenever the judge sitting as trier of fact learns before trial of such pre-sentencing information as the prior arrest and conviction record of the accused or aggravating circumstances surrounding the alleged crime, "the possibilities of prejudice are obvious." Commentary to Standard 4.2, American Bar Assoc. Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 208-9 (1967). *See also Argersinger v. Hamlin*, 407 U.S. 25, 42, (Burger, C.J., concurring) and 54 (Powell J., concurring in result); H. Kalven, Jr. and H. Zeisel, THE AMERICAN JURY. 124 (1966); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure Rule 321(b), Comment at 53 (Approved Draft, 1974); Illinois Rev. Stat. Ch. 38, § 1005-3-4 (1977). Even in a jury trial, the disclosure of such presentencing information to the judge before trial may be prejudicial. The Court has noted that such pre-trial disclosure to a judge presiding over a jury trial would be of sufficient prejudice to contravene the purpose of Federal Rule of Criminal Procedure 32(c)(i). which prohibits a judge from considering pre-sentence reports before a finding or plea of guilt. *Gregg v. United States*, 394 U.S. 489, 492 (1969).

The need for an on-the-record hearing in which the defendant has notice and an opportunity to answer any

accusations the prosecutor makes against him is particularly important where the information the prosecutor is giving the court prior to trial is of a presentencing nature. The potential for prejudice is enormous when judge and prosecutor engaged in a private, pre-trial, off-the-record communication about the character of the defendant and the nature of his supposed criminal activities. Such *ex parte* communications are inconsistent with the fundamental principles of our adversary system of justice, and, as such, have been condemned by court and bar association alike. American Bar Association, Canons of Judicial Ethics, Canon 17 (1967); American Bar Association, Standards Relating to the Prosecution Function and the Defense Function, Section 2.8 (Approved Draft 1971); American Bar Association, Code of Professional Responsibility, EC 7-36, (1969); *Haller v. Robbins*, 409 F. 2d 857 (1st. Cir. 1969); *United States v. Solomon*, 422 F. 2d 1110 (7th Cir. 1970).

C.

THE PROCEDURAL SAFEGUARDS REQUIRED FOR A PRE-TRIAL DETERMINATION OF THE NECESSITY OF DEFENSE COUNSEL IN A MISDEMEANOR TRIAL INCLUDE AN ADVERSARY ON-THE-RECORD HEARING THAT RESULTS IN WRITTEN FINDINGS AND REASONS MADE BY A JUDGE OTHER THAN THE ONE WHO PRESIDES OVER THE DEFENDANT'S TRIAL.

Several procedural safeguards are therefore necessary both to assure an accurate case-by-case determination of the necessity of defense counsel and to eliminate the prejudice otherwise likely to result from pre-trial judicial consideration of the defendant's capacity or the likelihood of defendant's imprisonment. First, and perhaps most important, is the requirement that the

judge make on-the-record findings as to his reasons for refusing to appoint counsel. This will assure that the judge consider the factors determinative of the necessity for counsel and arrives at a rational assessment of those factors in a manner capable of review by a higher court. *Cf. Boykin v. Alabama*, 395 U.S. 238, 244 (1969). The Court has held that due process requires trial courts to make findings and give reasons in analogous contexts where the defendant's rights depend upon the court's giving due considerations to certain interests of the defendant. *Kent v. United States*, 383 U.S. 541, 561-2 (1965) (waiver of juvenile court jurisdiction); *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) (imposition of heavier sentence after retrial). *See also Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977), and cases and articles cited therein. Additionally, in the quasi-judicial setting of a parole revocation hearing, the Court has required that the hearing officer's determination of the probationer's right to counsel be supported by a statement of reasons evidencing due consideration of the same types of factors on which the right to counsel at trial should depend. *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

Second, it is critical that the information which the judge considers in making his determination of the necessity of counsel be presented in an on-the-record proceeding at which defendant is present so that *ex parte* communications between prosecutor and judge about the defendant can be eliminated and the effect on the trial court of any prejudicial information about the defendant can be determined on appeal. *Cf. Garner v. Louisiana*, 368 U.S. 157, 173 (1961).

Third, the defendant should be given an opportunity to object to the introduction of erroneous evidence concerning his background, *Townsend v. Burke*, 334 U.S.

736, 740-741 (1948), and to argue in his own behalf that he needs counsel because of the complexity of his defense or his ignorance of the requisites of trial practice.[27] By not notifying the defendant that the court is in the process of deciding his right to counsel and then by failing to allow the defendant to argue why he should not be denied that right the court would deny the most basic element of due process of law, the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Finally, if the judge in determining the necessity of counsel should learn of defendant's prior record or of any non-admissible information concerning defendant's allegedly criminal activities, the trial should be held before a different judge.[28] Although judges, more than laymen, can be presumed not to rule on the basis of inadmissible information that they happen to hear in the

[27] This poses the same paradox that is inherent in the *Betts v. Brady* special circumstance rule in that the defendants who by virtue of their ignorance need the assistance of counsel the most, will by virtue of that same ignorance be least able to demonstrate such need. *Cf.* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 263 n.301; *Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.") In order to avoid the unfairness inherent in requiring a layman to demonstrate why he is incapable of fairly representing himself, counsel will often be required at the pre-trial determination in order to explore with the defendant and to explain to the court the need for counsel at trial.

[28] This however, would not solve the problem of what has been called "derivative bias" in that the trial judge would know when counsel has been appointed that his fellow judge found something sufficiently bad about defendant to believe imprisonment would be the likely sentence. KRANTZ, *supra* at 89-90 (1976); National Conference of Commissioners on Uniform State Laws, UNIFORM RULES OF CRIMINAL PROCEDURE Rule 321(b), Comment at 53. (Approved Draft, 1974).

course of a trial, the necessity of making a pre-trial prediction as to the likelihood of defendant's imprisonment would institutionalize the introduction before the court of negative information about the defendant. In order to avoid having to put each trial judge's impartiality to this difficult test, always to the jeopardy of the defendant, the judge who tries the case should not be the one who has decided the defendant is likely to be imprisoned if convicted. *Cf. In re Murchison*, 349 U.S. 133, 138-139 (1955).

Given the foregoing due process safeguards required in order to make the pre-trial determination of the necessity of counsel in a misdemeanor trial both accurate and non-prejudicial, the cost of affording the right to counsel to all misdemeanor defendants may not be significantly less than the cost of making such case by case determinations of the necessity of counsel. Nevertheless, if not all defendants charged with misdemeanors punishable by imprisonment have a Sixth Amendment, due process or equal protection right to counsel, each such defendant at least has a due process right both to a fair on-the-record hearing on the question of whether the assistance of counsel is required in his case and to a statement of reasons should the judge find counsel not required. The record of the trial below reveals that not only did the judge not afford the defendant a hearing, but he gave no consideration to the defendant's individual need for counsel. Such disregard of the most minimal standards of due process is an independent ground for reversal of Scott's conviction.

V.

PETITIONER'S TRIAL WAS UNFAIR AND THEREFORE DENIED HIM DUE PROCESS OF LAW.

An unfair trial violates due process of law regardless of the severity of the penalty imposed. *Carey v. Piphus*, ... U.S. ....., 98 S.Ct. 1042, 1053-1054 (1978); *Argersinger v. Hamlin*, 407 U.S. 25, 62 (1972) (Powell, J., concurring in result). If the Court should find the right to counsel not constitutionally required in all misdemeanor trials, the pervasive unfairness in the conduct of petitioner's trial would still require reversal. However, a reversal solely because the trial itself proved unfair, rather than because the right to counsel was denied, would be inappropriate for several reasons. First, it would be inconsistent with the finding in *Argersinger* that counsel is as essential to a fair trial in misdemeanor cases as it is in felony cases. 407 U.S. at 32-34. It follows from this equation of defendants' need for representation in felony and misdemeanor trials that the *per se* guarantee of the right to counsel which *Gideon v. Wainwright*, 372 U.S. 335 (1963), held was necessary for a fair trial in felony cases is also necessary in misdemeanor cases.

Second, a rule which requires analysis of the circumstances of each trial in order to determine whether unfairness resulted from the absence of counsel would contradict the premise of the Court's holdings in *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1181, 1182 (1978), that a denial of counsel must always be presumed to be prejudicial because of the impossibility of knowing what competent counsel might have accomplished in attempting to avoid conviction. Even if prejudice were not automatically presumed, the progression of pre-*Gideon* Court decisions applying the special

circumstances rule of *Betts v. Brady*, 316 U.S. 455 (1942), reveals that in practically every case where counsel is denied, fundamental unfairness is evident because competent counsel can always be expected to make a significantly better showing than a layman. *Cf. Carnley v. Cochran*, 369 U.S. 506 (1962); *Chewning v. Cunningham*, 368 U.S. 443, 447 (1962); Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L.R. 219, 280 (1962).

Finally, implementation of a rule requiring case-by-case determinations of unfairness would encounter the same difficulties experienced under the *Betts v. Brady* special circumstances rule, which court and commentator alike have condemned as unworkable and disruptive to the judicial process.[29] Moreover, it is almost certain that a special circumstances rule would be even

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[29] The criticisms of the special circumstances rule have focused on the following shortcomings: (1) trial judges are unable to predict whether or not events in the forthcoming trial will create a need for counsel, *Cf.* Brief for the State Governments *Amici Curiae*, pp. 17-18, filed by the Attorneys General of twenty-three states in *Gideon v. Wainwright*, 372 U.S. 335 (1963); (2) the vagueness of the standard results in uncertain, uneven and often grudging application of the rule by trial and appellate courts, *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan J. concurring); *Carnley v. Cochran*, 369 U.S. 506, 518-519 (1962) (Black, J. concurring); Israel, *Gideon v. Wainwright, The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 264; (3) it requires extensive examinations of state law by the Supreme Court in order to determine whether errors on unconsidered issues revealed a need for counsel, *The Supreme Court, 1961 Term*, 76 Harv. L.R. 54, 116 (1962); (4) the burden of showing fundamental unfairness in the trial is placed only upon those who cannot afford to hire counsel, *McNeal v. Culver*, 365 U.S. 109, 118-119 (1961) (Douglas, J., concurring) and (5) by virtue of its breadth and vagueness, the special circumstances rule increases the Court's caseload by stimulating direct and collateral attacks on convictions. *The Supreme Court, 1948 Term*, 63 Harv. L.R. 119, 136 (1949).

less effective in assuring misdemeanor defendants a fair trial than it was in protecting the fair trial rights of felony defendants. The "low visibility" and the "rush-rush" assembly-line nature of many misdemeanor courts, *Sibron v. New York*, 392 U.S. 40, 52 (1968), *Argersinger v. Hamlin*, 407 U.S. 25, 34, 35 (1972), will often prevent each misdemeanor defendant's particular need for counsel from being given the careful scrutiny required by the special circumstances rule.

Nevertheless, should the Court find it necessary to examine the record below in order to determine whether petitioner's trial met the standards of due process, it is evident that unfairness pervaded the trial and that under several of the criteria established by the post-*Betts* decisions implementing the special circumstances test, the conviction must be reversed. Most significant in this regard, after the State had rested its case, defense counsel would undoubtedly have moved for a directed verdict on the grounds that there was no evidence that Scott had not paid for the items he allegedly stole.[30] By testifying Scott not only waived his directed verdict motion, *People v. Washington*, 23 Ill.2d 582, 179 N.E.2d 635 (1962), but he also tended to incriminate himself by volunteering that he was trying to find the sales girl in order to purchase the items when he was stopped in the store by the security guard. (A. 10) It is doubtful that Scott knew that he did not have to testify because the Judge did not advise him of his Fifth Amendment privilege against self-incrimination. Instead, the Judge asked him what he wished to say after the State rested its case. (A. 8)

[30] The complaining witness testified that he was outside the store for a few minutes before Scott walked out with the allegedly stolen item that Scott said belonged to him. (A. 8)

The second ground of unfairness was the lack of any cross-examination of the one witness against Scott. The Court has often identified ineffective cross-examination as an element of fundamental unfairness under the special circumstances test. *Carnley v. Cochran*, 369 U.S. 506, 512 (1962); *McNeal v. Culver*, 365 U.S. 109, 113-114 (1961). *A fortiori*, the lack of any cross-examination must evidence even greater unfairness.

Third, a coherent direct examination to elicit Scott's testimony might well have eliminated the Judge's confusion as to the sequence of events inside the store. Scott's testimony exemplifies the problem described in *Ferguson v. Georgia*, 365 U.S. 570, 593 (1961), faced by any defendant who must make a statement without the guidance of counsel: "he has been set adrift in an uncharted sea with nothing to guide him, with the result that his statement in most cases either does him no good or is positively hurtful." (quoting 7 Ga. B.J. 432, 433 (1945)).

Fourth, the Judge gave Scott no opportunity to make a closing argument, but rather, pronounced his guilt immediately after Scott's last response to the judge's questioning. The right of a *pro se* defendant to make a closing argument was deemed fundamental by the Court in *Herring v. New York*, 422 U.S. 853 (1975).

Finally, the Judge's conduct towards the defendant was an essential element of the trial's unfairness. The Judge did not notify Scott of any of the fundamental constitutional rights that have been deemed essential to a fair trial, including the right to be informed of the elements of the offense charged, the right to cross-examine witnesses, the right to call and compel witnesses in his own behalf, and the privilege against self-incrimination. Scott exercised none of these rights.

Moreover, after the State had rested its case, having foregone cross-examination and rebuttal, the Judge not only failed to advise Scott that he too could rest, but instead, asked Scott more questions to clear up the Judge's admitted doubts about the sufficiency of the State's case.[31] The conduct of the Judge in Scott's trial was far below the standard the Court has required of trial judges with respect to their duty to protect the rights of *pro se* defendants. *Cf. Carnley v. Cochran*, 369 U.S. 506, 510-511 (1962); *McNeal v. Culver*, 365 U.S. 109, 114 (1961).

The pervasive unfairness of Scott's misdemeanor trial was not the result of an unusually incompetent defendant, an unusually complicated factual or legal case, or an unusual trial judge. It was the usual result of a criminal trial in which only the State is represented by counsel. Although the foregoing examples of unfairness in Scott's trial demonstrate why this particular conviction should be reversed, more importantly, they demonstrate why it is necessary to require the right to counsel "in all criminal prosecutions."

[31] "The Court: There's a lot of questions I want to know." (A. 9)

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the judgment and opinion of the Supreme Court of Illinois, which affirmed the decision of the Appellate Court of Illinois, First District, which affirmed the conviction of petitioner by the Circuit Court of Cook County, Illinois, be reversed.

Respectfully submitted,

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APPENDIX TO BRIEF FOR PETITIONER

State*	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Alaska	Any offense which may result in imprisonment, loss of valuable license, or a heavy fine.	Alaska Stat. §18.85.100 (Supp. 1973) Alaska Const., Art. 1 §11.	*Alexander v. City of Anchorage*, 490 P. 2d 910 (Alaska, 1971).	
Arizona	In any criminal proceeding which may result in punishment by loss of liberty and in any other criminal proceeding in which the court concludes that the interests of justice so require.	17 A.R.S. Rules of Crim. Proc. 6.1(b) (1975).		Pre-*Argersinger* rule required a mandatory appointment if potential penalty 6 months imprisonment or $500 fine or both. *Barrage v. Superior Court*, 105 Ariz. 53, 459 P. 2d 313 (1969).
California	In every criminal case including misdemeanors.	Cal. Penal Code §§858, 859, 987 Cal. Const. Art. 1 §15 (1975).	*People v. Williams*, 90 Cal. Rptr. 292 (1970); *In re Lopez*, 84 Cal. Rptr. 361, 465 P. 2d 257 (1970); *In re Render*, 76 Cal. Rptr. 522 (1969); *In re Johnson*, 42 Cal. Rptr. 228, 398 P. 2d 420 (1965).	

* Alabama, Florida, Georgia and Mississippi are not listed, although they are subject to the rule of the Fifth Circuit Court of Appeals that the Sixth Amendment right to counsel applies in all cases in which imprisonment is an authorized sentence. *See Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976); *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975).

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Connecticut	In any criminal action.	Conn. Gen. Stat. §51-296 (1975).		Pre-*Argersinger* rule adopted federal standards. §51-297(f) defines an indigent defendant as a person who is formally charged with the commission of a crime punishable by imprisonment and who does not have the financial ability to hire counsel.
Delaware	Each indigent person who is under arrest or charged with a crime if the defendant requests it or the court so orders [In practice counsel is appointed for all but traffic offenses. 57 *Iowa Law Rev.* 597, 807 (1972)].	Del. Code Ann. 29 §4602 (1974).		
Hawaii	Any offense punishable by confinement in jail or prison.	Hawaii Rev. Stat. §802-1.		
Indiana	All criminal prosecutions.	Ind. Const., Art. 1 §13.		
Louisiana	At each stage of the proceedings, every person is entitled to assistance of counsel of his choice or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.	La. Const., Art. 1 §13 (1974) La. Code Crim. Proc. Art. 513 (Supp. 1975).	*State v. Coody*, 275 So. 2d 773 (La. 1973).	Pre-*Argersinger*, appointment of counsel limited to felony cases (1967).

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Massachusetts	Any crime for which a sentence of imprisonment may be imposed.	Mass. Sup. Jud. Ct. Gen. R. 3.10.	*MacDonald v. Commonwealth*, 353 Mass. 277, 230 N.E. 2d 821 (1967).	
Michigan	Any case where the court may impose a sentence of imprisonment.	Ad. Order— S. Ct. of Mich. July 27, 1972.	*People v. Harris*, 45 Mich. App. 217, 206 N.W. 2d 478, 480 (1973) ("Defendant has right to appointment of counsel at trial even though he is charged only with a misdemeanor offense, conviction of which could subject him to imprisonment.")	
Minnesota	Any case which may lead to incarceration.		*State v. Borst*, 277 Minn. 388, 154 N. W. 2d 888 (1967); *Wertheimer v. The State*, 294 Minn. 293, 201 N.W. 2d 383 (1971).	
New Hampshire	In every criminal case in which the defendant is charged with a felony or a misdemeanor.	N.H. Rev. Stat. Ann. §604-A:1 to 2 (Supp. 1973).		Prior law did not provide counsel in petty offenses and misdemeanors not punishable by imprisonment or a fine exceeding $500.

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
New Mexico	If any person charged with any crime that carries a possible sentence of imprisonment appears in any court without counsel, the judge shall inform him of his right to be represented by the district public defender at all stages of the proceedings against him.	N. Mex. Stat. Ann. §41-22 A-12 (2) (Supp. 1973).		
New York	Every action charging a misdemeanor.	CPL §170.10.3(c) (does not apply where charge limited to traffic infraction).	*People v. Weinstock*, 80 Misc. 2d 510, 511, 363 N.Y. S. 2d 878 (1974) (advise of right to counsel and appointed counsel if indigent where defendant is charged with traffic violation and subject to possible imprisonment).	
Ohio	Appointment of counsel where the possible penalty is imprisonment.	Ohio R. Crim. Proc. 44 (A) to (B) (1973) Ohio Rev. Code §2941.50 (1974).		Pre-*Argersinger*, appointment of counsel for felonies only.
Oklahoma	In all criminal cases.	Okl. Stat. Ann. §22-464,1271 (Supp. 1974).	*Hunter v. State*, 288 P. 2d 425 (Okl. 1955); *Stewart v. State*, 495 P. 2d 834 (Okl. 1972).	

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Oregon	In all criminal prosecutions where imprisonment is a possible sanction.	Oregon Const., Art 1 §11.	*Brown v. Multnomah County District Court*, 29 Ore. App. 917, 566 P. 2d 522, 525 (1977).	
South Dakota	In any criminal action in the circuit, municipal or district county court, judge shall assign at any time following arrest, counsel for indigent defendant's defense.	S.D. Comp. Laws Ann. §23-2-1 (1975).		
Tennessee	Every person accused of any crime or misdemeanor whatsoever, is entitled to counsel.	Tenn. Code Ann. §40-2002.		
Texas	An accused charged with a felony or misdemeanor punishable by imprisonment.	Tex. Code Crim. Proc. Art. 26.04 (1965).	*Trevino v. State*, 555 S.W. 2d 750, 751 (Tex. Crim. App. 1977).	
Washington	All criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors or otherwise.	Wash. J.Cr.R. 2.11(a)(1).	*McInturf v. Horton*, 85 Wash. 2d 704, 538 P. 2d 499 (1975).	
Wisconsin	Whenever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration.		*State ex rel. Winnie Harris*, 75 Wis. 2d 547, 249 N.W. 2d 791, 796 (1977).	